Circuit Court for Baltimore City
Case Nos. 118155013, 118155014,
118155015, & 118155016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 938

September Term, 2019

SHAWN LITTLE

v.

STATE OF MARYLAND

Berger,
Arthur,
Gould,

JJ.

Opinion by Arthur, J.

Filed: December 30, 2020

A jury in the Circuit Court for Baltimore City convicted appellant Shawn Little of one count of second-degree murder and three counts of attempted second-degree murder. The court sentenced Little to a term of 40 years' imprisonment for the conviction of second-degree murder and three concurrent terms of 30 years' imprisonment for the remaining convictions. In this appeal, Little presents two questions:

1. Did the trial court err by failing to disclose juror communications to the defense?

2. Did the trial court err by denying [Little's] motion to suppress?

We cannot answer the first question at this time, because the record contains factual discrepancies regarding whether the defense was aware of the existence and content of one of the communications. Consequently, we shall order a limited remand, without affirming or reversing, to permit the court to hold an evidentiary hearing to resolve those discrepancies. Md. Rule 8-604(d)(1). We shall address Little's questions following the outcome of that hearing.

BACKGROUND

On May 5, 2018, Darren Meredith and three friends were sitting in a parked car listening to music. Meredith saw a white car pull up and park behind his. Several men got out of the white car and approached Meredith's car. One of the men, armed with a rifle, fired into Meredith's car, killing one of the young men inside. Little was later identified as one of the men who had gotten out of the white car just before the shooting. He was arrested and charged in the shooting.

On the first day of trial, Monday, April 8, 2019, the trial court informed the prospective jurors that the trial would last until "close of business on Friday." The court asked: "Is there any member of the jury panel that has an absolutely compelling reason which makes it impossible for you to serve as a juror on this case for that amount of time?" Several prospective jurors responded in the affirmative, and many of them were struck for cause.

A jury was selected from the remaining jurors. Of the jurors who were selected, none appear to have responded affirmatively to the court's question regarding whether they had a compelling reason that would make it impossible for them to serve as a juror until the close of business on Friday.

After the jurors had been selected, the trial court excused them for the day and instructed them to return the following morning. The attorneys and the defendant remained in the courtroom in anticipation of a hearing on a motion in limine.

According to an audio-visual recording of the trial, a female juror approached the bench at 12:54 p.m., while the attorneys and the defendant remained at the trial tables. The transcript reflects that the following colloquy ensued:

THE COURT: You have a question?

UNIDENTIFIED JUROR: Yeah, I would like –

THE COURT: Sure.

UNIDENTIFIED JUROR: (Indiscernible – 12:54:23).

THE COURT: When?

UNIDENTIFIED JUROR: On Friday.

THE COURT: Okay. We should be out of here by then. That's my hope.

UNIDENTIFIED JUROR: (Indiscernible – 12:54:29).

THE COURT: Okay. So you're leaving taking a train or –

UNIDENTIFIED JUROR: Yeah, we're taking a train.

THE COURT: What time's your train for?

UNIDENTIFIED JUROR: 11:00.

THE COURT: Okay. All right. Thank you. Remind me on Friday. Let's see where we are, but remind me Friday, okay?

In the audio-visual recording of the proceedings, some of the judge's statements are audible, but most of the juror's are not. It is unclear whether counsel overheard or took note of any part of the discussion while they were seated at the trial tables, some distance away.[1] We see nothing in the trial record to indicate that the court informed counsel of what the juror had said or otherwise discussed the juror's statements with them.

On the following morning, the jurors returned to court, and the proceedings continued with opening argument. Two days later, the parties rested. The jury retired to begin its deliberations at approximately 4:16 p.m. on Thursday afternoon.

Shortly after the deliberations began, the court decided to excuse the jurors for the day. At that time, Little was in a holding cell. Rather than make the jurors wait until the

[1] In general, the camera is trained on the bench, where the conference is occurring. On two fleeting occasions, the camera cuts to the defense trial table. On one of those occasions, defense counsel appears to be conferring with her client.

sheriff could bring Little back to the courtroom, the court excused the prosecutor and defense counsel before the jurors returned.

When the jurors returned, the court instructed them that deliberations would continue the next day. The following colloquy ensued:

A JUROR: What time did you say, I'm sorry?

THE COURT: 9:00 a.m.

A JUROR: 9:00.

THE COURT: Okay. Is that – I mean, this is your show at this point.

A JUROR: That's fine.

THE COURT: I mean, is 9 o'clock okay for people?

A JUROR: That's fine.

A JUROR: Yeah.

A JUROR: I think the earlier the better.

THE COURT: I'm sure you want to get your weekend started.

A JUROR: It's fair.

THE COURT: So –

A JUROR: And I have to be gone by 4:00 tomorrow. I think I told you that.

THE COURT: Oh, right, right, right. I remember you told me that.

On the following morning, the jury returned to court and continued its deliberations.

During the deliberations, the jury submitted a total of 18 notes. One note, which was not shared with the parties, was time-stamped 1:26 p.m. on Friday, April 12, 2019, the last day of trial. It reads as follows:

> I have a 4:43 p.m. train. May I please be out of the juror room by 3:30 p.m. to give us time to collect our belongings, be escorted out, etc. . . . ? I am taking my 6 yr. old daughter to NYC for her birthday and have had this planned for months. Thank you! Juror #8.

(Ellipsis in original.)

At 2:57 p.m., the jury returned its verdict of guilty on the charges of second-degree murder and attempted second-degree murder. The court dismissed the jurors at 3:07 p.m.

Little noted a timely appeal. As part of his appeal, Little obtained approval to supplement the record to include affidavits from his trial attorney and the trial judge. Both affidavits concern the communications that the judge had with the jury during the trial.

In pertinent part, the trial judge's affidavit stated:

> 2. During the course of the trial there were 17 jury notes.[2]
>
> 3. One note "Note 17" dated 4/12/19 stated, "I have a 4:43PM train. May I please be out of the juror room by 3:30PM to give us time to collect our belongings, be escorted out, etc….? I am taking my 6 yr. old daughter to NYC for her birthday and have had this planned for months. Thank you! Juror #8."
>
> 4. Based on the record, this note was not addressed in open court and did not include signatures from the attorneys.

[2] Actually, there were 18 notes, but the eighteenth simply announces that the jury had reached a verdict.

5. My recollection is that during jury selection the juror who wrote this note notified the Court and the attorneys that if selected she would need to leave early on Friday 4/12/19 for a pre-planned trip.

6. The Court and the attorneys agreed that we can accommodate her if chosen.

7. This juror was chosen.

8. At 1:26PM on 4/12/19 the juror wrote Note #17 to remind the Court of her need to leave early that day for her trip.

9. The attorneys in the case were already aware that Court was ending early that day to accommodate the juror. This accommodation had been calculated into the trial schedule at the beginning of the trial.

10. The note did not include any facts that the attorneys were not previously made aware of on the record.

Defense counsel's affidavit stated, in pertinent part:

3. I received a letter from Samuel Feder, Assistant Public Defender, who is representing Mr. Little on appeal. Enclosed with the letter was a copy of a jury note from Mr. Little's trial. The note is marked Note 17 and dated 4/12/19. In the letter, Mr. Feder asked me, the trial prosecutor, and the trial judge if we recalled the note.

4. To the best of my knowledge and recollection, I was not shown the jury note enclosed with Mr. Feder's letter, nor provided an opportunity to review the note with Mr. Little or to weigh in on the court's response to the juror's question.

5. To the best of my knowledge and recollection, I was not informed of any other communications from Juror #8 except for what appears in the April 8th trial transcript of *voir dire* and jury selection. That includes that I was not informed of any communications indicating that Juror #8 intended to leave before the close of business on April 12th.

DISCUSSION

Maryland Rule 4-326(d) governs communications between a juror and the court during a criminal trial. Rule 4-326(d)(2)(A) states that "[a] court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication." The judge must then determine "whether the communication pertains to the action." Md. Rule 4-326(d)(2)(B). "If the judge determines that the communication does not pertain to the action," as when, for example, a juror asks for permission to make a personal call,[3] "the judge may respond as he or she deems appropriate." *Id.* If, however, "the judge determines that the communication pertains to the action," such as when it affects the juror's ability to continue deliberating,[4] "the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response." Md. Rule 4-326(d)(2)(C).

A court errs if it does not promptly disclose a juror's communication that "pertains to the action." *See, e.g., Harris v. State*, 428 Md. 700, 720 (2012); *accord Gupta v. State*, 452 Md. 103, 123 (2017). "[O]nce such error is established, it only remains for [the appellate court] to determine whether that error was prejudicial to the defendant and, thus, requires reversal." *Harris v. State*, 428 Md. at 720; *accord Gupta v. State*, 452 Md. at 123. To accomplish that task, "we must look to the record of what transpired in the

[3] *See Harris v. State*, 428 Md. 700, 716 (2012).

[4] *See Harris v. State*, 428 Md. at 716; *accord Gupta v. State*, 452 Md. 103, 121 (2017); *Grade v. State*, 431 Md. 85, 100 (2013).

circuit court to determine whether it 'affirmatively show[s] that the communication (or response or lack of response) was not prejudicial.'" *Gupta v. State*, 452 Md. at 125 (alteration in original) (quoting *Denicolis v. State*, 378 Md. 646, 659 (2003)). The Court of Appeals has found harmless error where the parties learned of a previously undisclosed communication "at a time when the court still had options before it regarding how to resolve the situation," defense counsel had "multiple opportunities to provide input on how to address the situation," and the court took action only "after considering and rejecting those proposals on the record." *Id*. at 127.

Little argues that the trial court erred in failing to disclose three communications from the jury to the court. The first communication occurred just after the completion of jury selection on Monday (the first day of trial) and consisted of an oral conversation in which a juror informed the court that she was scheduled to board a train that Friday. The second communication occurred at the end of the day on Thursday (the fourth day of trial) and consisted of an oral conversation in which the juror informed the court that she "had to be gone by 4:00" the following day. The third communication occurred at 1:26 p.m. on Friday (the last day of trial) and consisted of a written communication in which the juror asked the court if she could "be out of the juror room by 3:30 p.m." because she had "a 4:43 p.m. train."

Little maintains that the court shared none of the communications with the defense. He argues that the court should have disclosed the communications because each "indicated that [the juror's] ability to continue to serve was dependent on the trial

ending before the close of business on Friday, [April] 12th." He also argues that the trial judge is "mistaken" in stating that Juror No. 8 had notified the court and the attorneys about her scheduling conflict "during jury selection" and that the court and the attorneys agreed to accommodate her "if" she were "selected." He correctly observes that the first communication did not occur until after jury selection was complete and the juror had been selected.[5]

According to Little, there "is no indication that the defense was aware of what [the juror] said, or that the defense agreed that she should serve on the jury despite her scheduling conflict." To the contrary, Little argues, the audio-video recording of the courtroom shows that the conversation was "private" and that it "would not have been audible to defense counsel, who was at defense table." Even if defense counsel knew of the initial communication, Little argues that the court should have disclosed the subsequent communications because they provided "new information," namely, that the juror "intended to leave at 4:00 or 3:30 p.m.," and not at "11:00," which Little interprets to mean 11:00 p.m.

The State responds that the record is insufficient for this Court to determine whether the failure to disclose the second and third communications was harmless error. In the State's view, the affidavits "are vague and conflict with one another."[6] The State

[5] The State glosses over the literal language of the judge's affidavit and interprets her as saying that the attorneys were "notified about the impending scheduling conflict on the day of jury selection."

[6] Despite its argument that the affidavits "conflict with one another," the State also argues that defense counsel's affidavit "appears not to contradict" the trial judge's

maintains, therefore, that we should remand for findings of fact as to "what transpired and when, between Juror No. 8, the trial judge, and the attorneys for the two parties below." We have remanded for further fact-finding in the past when it was similarly unclear whether the trial court had informed the parties of its communications with the jurors. *See Perez v. State*, 420 Md. 57, 62 (2011).

We agree that we should remand the case to the circuit court for additional findings of fact before we can proceed.

The parties agree that each of the communications involved Juror No. 8. The parties also agree that the communications pertained to the action.[7] And the parties agree the court did not disclose the second and third communications.

statement that the attorneys and court learned of the scheduling conflict "on the day of jury selection." In support of its argument, the State cites defense counsel's statement that she "was not informed of any other communication from Juror #8 except for what appears in the April 8th trial transcript." Although counsel's affidavit could perhaps be clearer than it is, we question whether the State's reading is a fair one. In the following sentence of the affidavit, defense counsel categorically states that she "was not informed of any communications indicating that Juror #8 intended to leave before the close of business on April 12th."

[7] On page 2 of its brief, the State writes: "There is no doubt that a juror's scheduling challenge 'pertains to the action' before the court." The State candidly concedes that any argument to the contrary is foreclosed by *Gupta v. State*, 452 Md. at 123, in which the Court held that it was error (albeit harmless error in the circumstances of that case) for the trial judge not to inform counsel of a juror's communication concerning a scheduling conflict and of the judge's response. "Information that implicates, and may impact, a juror's ability to continue deliberation" is "especially relevant when 'the juror suggests that his or her ability to continue is dependent upon a speedy conclusion of the trial.'" *Id*. at 121-22 (quoting *Harris v. State*, 428 Md. at 716).

The parties, however, disagree about whether the court disclosed the first communication to the attorneys (or perhaps about whether the attorneys were aware of the communication). The State argues that if defense counsel was aware of the juror's scheduling conflict (as the trial court asserts), then the court's failure to disclose the subsequent communications might be harmless error.[8]

We express no opinion on the merits of the State's assertion of harmless error, except to say that its viability depends on a finding that defense counsel knew of the juror's scheduling conflict. No such finding has yet been made. Furthermore, because any such finding would depend on the resolution of the tension between the trial judge's affidavit and defense counsel's affidavit, we, as an appellate court, are incapable of making it.

For those reasons, we shall order a limited remand, without affirming or reversing, pursuant to Maryland Rule 8-604(d)(1). That rule states:

> If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. In the order remanding a case, the appellate court shall state the purpose for the remand. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court.

[8] The State also seems to suggest that defense counsel may have had an obligation to ask the trial judge what she and the juror had discussed at the bench on the first day of trial. To the contrary, counsel is generally entitled to presume that a court will comply with the rules and will disclose any communications that pertain to the action. Ordinarily, if the court does not disclose a communication with a juror, counsel is entitled to assume that the communication did not pertain to the action.

Upon remand, the circuit court should conduct an evidentiary hearing to make a factual finding as to whether the parties were aware or became aware of the substance of the juror's communication with the trial judge at approximately 12:54 p.m. on Monday, April 8, 2019. The court should also make a factual finding as to whether the parties knew about the juror's potential scheduling conflict at any time before the conclusion of the trial and, if so, what they knew, when they knew it, and how they came to know of it.

The evidentiary hearing shall be conducted by a judge other than the judge who presided at Little's trial, as she may be a witness at the hearing. The court should make every effort to hear testimony from the trial judge, defense counsel, the prosecutor, and any other person who is likely to have first-hand knowledge of the events in question. The court shall supplement the record with any exhibits or orders that result from the hearing.

Upon the circuit court's supplementation of the record, the parties shall file supplemental briefs that focus on the facts as found by the circuit court at the evidentiary hearing. The resolution of the issues raised in the instant appeal will be postponed pending the outcome of the hearing and the receipt of the parties' supplemental briefs.[9]

[9] In his reply brief, Little expands on his argument that even if defense counsel were aware of the communication that occurred on the first day of trial, we cannot find harmless error in the failure to disclose the two subsequent communications, because those communications "included significant new information." It is unnecessary for us to address that argument until we have a factual determination regarding whether defense counsel actually was informed of the juror's scheduling conflict during jury selection (as the trial judge said) or on the first day of trial (as the State says).

CASE NUMBERS 118155013, 118155014, 118155015, AND 118155016 REMANDED, WITHOUT AFFIRMANCE OR REVERSAL, TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.